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ABSTRACT

In the case of RAV v. City of St. Paul, a teenager was charged with violating the city's Bias-Motivated Crime Ordinance after being accused of burning a cross inside the fenced yard of a black family. In a 9-0 decision, the Supreme Court struck down the St. Paul ordinance, a decision which raised a question as to whether many college and university speech codes could be found unconstitutional by the Supreme Court's current majority. This paper attempts to resolve the dispute over this issue in the light of the RAV decision. The first section summarizes the types of college and university speech codes that exist in the United States. The second section argues that many speech codes would be found unconstitutional under Justice Scalia's majority opinion. The third section analyzes the concurring opinions of other justices. The majority opinion held that when a regulation on speech fits a categorical exception to the First Amendment, that regulation must be content-neutral. Based on this reasoning, college and university speech codes which only regulate "fighting words" directed at historical victims of discrimination would probably be held unconstitutional as well. However, an analysis of the concurring opinions written by four of the Court's more liberal justices appeared to leave the door open for a ruling that a speech code, if limited to racist and sexist fighting words, would be constitutional. (The St. Paul ordinance prohibited the display of symbols--such as burning crosses--calculated to arouse anger, alarm, etc., in traditional hate crime targets). If a member of the majority left the Court and was replaced by a jurist whose philosophy was more consistent with the RAV concurring justices, any speech code case reaching the Court would have a greater chance of survival. (Sixty-eight footnotes are included.) (RS)

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COLLEGE AND UNIVERSITY SPEECH CODES

IN THE AFTERMATH OF R.A.V. V. CITY OF ST. PAUL

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INTRODUCTION

In R.A.V. v. City of St. Paul(1), a teenager was accused of burning a cross inside the fenced yard of a black family. The defendant was charged with violating the St. Paul Bias-Motivated Crime Ordinance(2). That ordinance prohibited the display of a symbol, such as a burning cross, which one knows arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.

In a 9-0 decision(3), the Supreme Court struck down the St. Paul ordinance. The R.A.V. decision cast uncertainty on the constitutionality of college and university speech codes, which regulate some or all on-campus speech that insults individuals on the basis of characteristics such as race, gender, or sexual orientation. Opponents of speech codes were optimistic that the ruling sounded the death knell for such restrictions(4). Attorney Mark Anfinson, who represented the Minnesota Civil Liberties Union in the case, maintained that the decision "turns most of the campus codes into hamburger(5)." Justice Blackmun's concurring opinion accused the majority of poisoning the well by using the RAV case to "decide the issue over 'politically correct speech,'" even though the case could simply have been decided on overbreadth grounds(6). On the other hand, administrators at the University of California and Stanford were confident that their codes were not invalidated by the holding(7).

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1. 60 L.W. 4667 (1992).
2. The complete text of the ordinance section in question is: "Whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." St. Paul, Minn. Legislative Code 292.02 (1990).
3. The unanimity of the decision masks the fact that only five justices (Scalia, Rehnquist, Kennedy, Souter, and Thomas) joined in the majority opinion. Different combinations of the other four justices joined in three concurring opinions.
4. See, e.g., Robert M. O'Neill, "Time to Re-Evaluate Campus Speech Codes," 38 CHRONICLE OF HIGHER EDUCATION A40 (July 8, 1992).
5. Scott Jaschik, "Campus 'Hate Speech' Codes in Doubt After High Court Rejects a City Ordinance," 38 CHRONICLE OF HIGHER EDUCATION A19 (July 1, 1992).
6. 60 L.W. at 4678
7. Louis Freedberg, "Stanford, UC Unruffled by Hate Speech Ruling," SAN FRANCISCO CHRONICLE A15 (June

This paper will attempt to resolve the dispute over the constitutionality of college and university speech codes in light of the RAV decision. The first section will summarize the types of speech codes which exist at colleges and universities in the U.S. Second, the paper will argue that many such speech codes would be found unconstitutional under the rationale of Justice Scalia's majority opinion. Third, this paper will analyze the concurring opinions. Based on the more code-friendly rationales of these opinions, it will be contended that it is premature to relegate speech codes to a historical footnote.

I. COLLEGE AND UNIVERSITY SPEECH CODES

All speech codes are not created equal. More than 100 colleges have speech code policies(8), and they prohibit different subsets of hate speech.

Some of the earlier speech codes contained very broad prohibitions on insulting language. The University of Michigan's first code, struck down on vagueness and overbreadth grounds(9), prohibited any behavior, verbal or physical, which stigmatized or victimized on the basis of characteristics including race or sex and created an intimidating, hostile , or demeaning environment for educational pursuits. The University of Arizona's proposed speech code would have banned "vilification of a student's age, sex, or religion(10)."

A common form of speech code only bans forms of racist, sexist, or homophobic language which constitute "fighting words"(11). These codes are based on the Court's holding in Chaplinsky v. New Hampshire(12), which maintained that words which "by their very utterance tend to incite an immediate breach of the peace" are not protected by the Constitution because they are "no essential part of any exposition of ideas," and are of slight social value as a step to truth.

Another possibility type of speech code only bans racial, sexual, or ethnic epithets. This type of code was adopted by the University of Michigan, after a broader code was struck down in Doe v. University of Michigan(13). The University of Wisconsin policy also bars epithets directed specifically toward individuals, when the insults are based on race, sex, or sex preference and are intended to create a

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29, 1992).

8. Id.
9. Doe v. University of Michigan, 721 F. Supp. 852, 866-67 (E.D. Mich 1989).
10. Christopher Shea, "Court's Decision on Hate Crimes Sows Confusion," 38 CHRONICLE OF HIGHER EDUCATION A26 (July 29, 1992).
11. Jaschik, supra note 5, at A19.
12. 315 U.S. 568 (1942).
13. 721 F. Supp. 852 (E.D. Mich. 1989).

hostile educational environment(14). The rationale of an epithet-only speech code is that epithets (disparaging nouns or adjectives used to characterize a person or race) are a particularly offensive form of hate speech, which can be regulated without denying the right to express controversial ideas, no matter how politically incorrect(15).

Some speech codes do not just ban hate speech which fits a particular categorical exception to the First Amendment, instead they ban all speech in a given category. The University of California and University of Connecticut both have speech codes which prohibit all fighting words(16). The University of Texas speech code is based on the tort concept of intentional infliction of emotional distress(17).

Based on the rationale of the majority opinion in R.A.V., most of these speech codes would probably be found unconstitutional. The next section of this paper will explain the reasoning of the R.A.V. majority and apply it to speech codes.

II. THE R.A.V. MAJORITY OPINION IMPLIES THAT MOST SPEECH CODES ARE UNCONSTITUTIONAL.

A. Speech Codes Which Proscribe Offensive Speech When It Does Not Fit a Categorical Exception

Any speech code regulating racist or sexist language(18), which does not fit a categorical exception to the First Amendment, had a high probability of being found unconstitutional before R.A.V. The Court's opinion reinforces this notion. The majority reiterated that the First Amendment generally prevents the government from regulating speech because it disapproves of the ideas presented(19). In Texas v. Johnson, the Court rejected the argument that flag burning could be regulated because

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14. Jaschik, supra note 5, at A22.
15. D. Fraleigh, "Racism in Academia: The Case for Regulating Hate Speech," at 15, 17-18. Paper Presented at the 77th Annual Meeting of the Speech Communication Association, November 3, 1991.
16. Shea, supra note 10, at A26.
17. Jaschik, supra note 5, at A22.
18. This paper will use terms such as "racist and sexist speech" as a generic reference to all speech codes which regulate speech which insults based on individual characteristics. Other typical forms of speech which are regulated includes speech which insults on the basis of sexual preference, religion, or disability.
19. 60 L.W. at 4669.

onlookers were seriously offended(20). Consistency would require that speech codes which prohibited racist and sexist language whenever the words are offensive should be found unconstitutional(21). Such a holding would also be consistent with Gooding v. Wilson, where a defendant's conviction for telling a police officer "white son of a bitch, I'll kill you" was overturned. In Gooding, the Supreme Court held that the Chaplinsky doctrine did not reach all words found offensive by society, but only language that had "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed(22)."

A speech code which was limited to racist and sexist epithets would be equally vulnerable. A ban which was limited to epithets would allow the expression of politically incorrect ideas (as long as offensive epithets were not used to refer to a person's sex or ethnic group). However, in Cohen v. California(23), the Supreme Court protected the defendant's First Amendment right to wear a jacket with the words "fuck the draft" because the First Amendment protects the emotive function of individual speech as well as the cognitive. This rationale would also apply to racist and sexist epithets(24).

B. Speech Codes Which Regulate Hate Speech When It Constitutes "Fighting Words"

Speech codes which only regulate racist and sexist language that constitutes fighting words are also highly suspect in the aftermath of R.A.V. The R.A.V. majority noted that it had to accept the Minnesota Supreme Court's construction of the St. Paul ordinance, which limited its

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20. Texas v. Johnson, 491 U.S. 397, 406-07 (1989).
21. Some commentators would argue that there is a distinction between flag burning and hate speech, because the latter is directed toward a historically oppressed group. See, e.g., Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 MICHIGAN LAW REVIEW 2320, 2357 (August 1989). These commentators make an emotionally compelling case for the unique pain caused by racist and sexist speech. However, First Amendment jurisprudence has never recognized the argument that speech may be limited because the offensive language was uttered by an empowered member of society rather than an oppressed one.
22. Gooding v. Wilson, 405 U.S. 518 (1972).
23. 403 U.S. 15 (1971).
24. See, e.g., Karon Jahn, "Racist-Sexist Hate Speech on College Campuses: Free Speech v. Equal Protection," Paper Presented at the 76th Annual Convention of the Speech Communication Association, November 3, 1990.

scope to expressions constituting fighting words, as defined in Chaplinksy(25). The pivotal issue in R.A.V. was whether a statute which only banned FIGHTING WORDS that caused anger, alarm, or resentment on the basis of race, religion or gender could survive constitutional scrutiny.

The Court held that even when a regulation of speech fell within a categorical exception to the First Amendment, the regulation could not serve as a vehicle for content discrimination(26). For example, the Court noted that the government could proscribe libel, but could not proscribe only that libel which was critical of city government(27). Subsets of categorical exceptions can be regulated only if the basis for the regulation is content neutral. For example, the government could prohibit obscenity only in certain media, such as obscene telephone communications(28), because the ban would not selectively regulate obscene phone messages on the basis of content.

A speech code which proscribes only racist and sexist fighting words would be unconstitutional under the R.A.V. rationale. Such speech codes punish the use of fighting words which convey a racist or sexist message, but permit the use of fighting words which offend the listener for other reasons. A speech code which would punish one student for calling another a term which denigrates gay people, while tolerating a student who called another a facist Nazi homophobe, would constitute viewpoint discrimination and "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules(29)."

That R.A.V. opinion noted some exceptions to the general rule that content discrimination is not permissible within a categorical exception to the First Amendment. The first exception is content discrimination based on "the very reason the entire class of speech at issue is proscribable(30)." For example, the state could prohibit only the most lascivious obscene displays of sexual activity, although it could not prohibit only obscenity that includes offensive political messages(31). For a speech code to fit this exception, a university would need to show that racist and sexist fighting words are the type of fighting words which are most likely to provoke a breach of the peace. Defenders of speech codes could have their own words turned against them when trying to make a speech code fit this exception. Stanford Law Professor Charles Lawrence has noted that despite the offensive nature of racist language, the victim's instinctive reaction will often be

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25. 60 L.W. at 4668.
26. Id. at 4669.
27. Id.
28. Id. at 4670.
29. Id. at 4671.
30. Id. at 4670.
31. Id. at 4670.

silence or flight(32). And women are not often socialized to respond to offensive language by pummeling their tormentors(33). Because the context of these incidents often involves a more powerful group of students insulting a smaller number of students, it would be fallacious to characterize racist and sexist language as words which are most likely to provoke a fight.

The second exception the Court articulated was for a subclass of speech which happens to be associated with "particular secondary effects of the speech, so that the regulation is 'justified without reference to the content of the speech(34) .'" As an example, the Court noted that a state could ban live obscene performances by minors, presumably because of unique harms to minors who participate in such activities. It could be argued that racist and sexist speech fits this exception because such words are much more painful than other offensive language(35). However, the R.A.V. majority specified that "the emotive impact of a speech on its audience is not a secondary effect(36)."

One final exception noted by the Court was content based discrimination because a "proscribable class of speech was swept up incidentally within the reach of a statute directed at conduct rather than speech(37)." The Court's example here was sexually derogatory fighting words, which are among the wide variety of behaviors that may produce a violation of Title VII's general proscription against discrimination in employment(38). It could be contended that this exception legitimizes speech codes. Many codes proscribe hate speech when it contributes to a hostile educational environment(39). Commentators who advocate

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32. Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 DUKE LAW JOURNAL 431, 453 (1990).
33. Id. at 454. See also Matsuda, supra note 21, at 2355-56.
34. 60 L.W. at 4670.
35. Lawrence, supra note 32, at 461.
36. 60 L.W. at 4672.
37. 60 L.W. at 4671.
38. The letter of the R.A.V. holding would seem to declare that sexual harassment legislation is unconstitutional. After all, sexual harassment laws prohibit harassment based on the disfavored topic of sexism, while doing nothing to outlaw other harassment in the workplace. The majority opinion (which Justice Thomas joined in) undoubtedly wanted to avoid raising this "can of worms" in the aftermath of the Thomas-Hill controversy. Justice White's concurring opinion chided the majority for its "eagerness to craft an exception to its new ... rule to avoid such an outcome. 60 L.W. at 4676.
39. For example, the University of Wisconsin policy

speech codes often point to the detrimental impact of hate speech on the education of women and minorities(40).

However, these claims would not fit codes into the third exception as it was applied by the majority in R.A.V. A campus disciplinary code would need to generally forbid one student from interfering with the educational opportunities of another, or it could not be analogized to Title VII's prohibition of workplace discrimination. Without the general ban on such interference, a speech code would permit speech which disrupted education, so long as that speech was not on the disfavored subjects of racism and sexism(41). As long as a code differentiates between permissible and impermissible words that create a hostile educational environment, the analogy to sexual harassment does not hold up(42).

C. Speech Codes Which Ban All Speech Fitting A Categorical Exception to the First Amendment

The R.A.V. decision leaves the door open to colleges and universities that wish to ban all speech in a particular category, such all fighting words. The majority opinion noted that "a limited categorical approach has remained an important part of our First Amendment jurisprudence(43)." In his concurring opinion, Justice White (joined by Justices Blackmun and O'Connor) stated that "the categorical approach is a firmly entrenched part of our First Amendment

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bars epithets directed toward individuals with the purpose of creating A HOSTILE EDUCATIONAL ENVIRONMENT on the basis of their race, gender, or sexual preference. Jaschik, supra note 5, at A22 (emphasis added).

40. See, e.g., Lawrence, supra note 32, at 456-57, 465.

41. For example, hate speech codes would presumably permit one student to tell another that "you do not belong in this calculus class because you are a dumb jock who could never get into college were it not for football."

42. The rationale that speech codes are constitutional because they protect the educational environment was rejected by a federal district court. In UWM Post v. Board of Regents, 774 F. Supp. 1163 (E.D. Wisc. 1991), the court was not persuaded by the Title VII analogy. The opinion noted that Title VII addresses employment, not educational settings, and that even Title VII could not supersede the requirements of the First Amendment. Id. at 1177.

43. 60 L.W. at 4669.

jurisprudence(44)." Only Justice Stevens expressed reservations with the categorical approach(45).

Because eight justices endorsed the categorical approach, it is likely that a speech code that bans all fighting words would pass constitutional muster. A university speech code which only applied to racist and sexist fighting words could presumably become constitutional if the code was amended to prohibit all fighting words. Justice White's concurring opinion noted that under the majority's logic, St. Paul could simply add some prefatory language concerning discrimination generally, and it would be constitutional under the majority's logic(46).

III. THE RATIONALES OF THE RAV CONCURRING OPINIONS WOULD UPHOLD A BROADER RANGE OF SPEECH CODES.

A. President Clinton's Appointment of Moderate or Liberal Justices Could Make the Concurring Justices Into a Majority

There were three concurring opinions in the R.A.V. case, two of which enjoyed significant support. Justice White wrote a concurring opinion which was joined by Justices Blackmun, O'Connor, and Stevens(47). Justice Stevens wrote a separate concurring opinion, a significant portion of which was joined by Justices Blackmun and White. These justices are among the Court members typically classified as the "liberal" or moderate wing of the Supreme Court. If President Clinton has the opportunity to replace one or more of the more conservative members of the Court, the opinions of the concurring justices could become a majority if a future speech code case reached the Supreme Court.

The concurring opinions do not legitimize every form of speech code. These opinions agreed with the majority that the R.A.V. statute was unconstitutionally overbroad(48).

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44. 60 L.W. at 4674 (White, J., concurring).
45. 60 L.W. at 4681 (Stevens, J., concurring).
46. 60 LW 4676.
47. Justice Stevens did not join in part I(A) of Justice White's opinion, which emphasized the continuing legitimacy of the categorical approach to First Amendment. He concurred in the remainder of Justice White's analysis.
48. Justice White's opinion noted that the St. Paul ordinance went beyond words which incited imminent lawless action or fighting words, and reached protected utterances. For example, words which cause "anger, alarm, or resentment" seemed to be prohibited by the St. Paul ordinance, even though such generalized reactions are not sufficient to strip expression of its constitutional protection, 60 L.W. at 4677. Justice Stevens' opinion agreed with that judgment,

However, a speech code which only applied to speech which fit a categorical exception to the First Amendment would survive under the concurring justices' analysis, even if the code discriminated on the basis of content.

B. Justice White's Concurring Opinion Would Provide Constitutional Legitimacy for Content-Discriminatory Speech Codes

1. A Speech Code Which Discriminated Based on Content Would Survive Strict Scrutiny.

Justice White believed that the content discrimination found in the St. Paul ordinance would survive a strict scrutiny analysis. According to Justice White, the St. Paul ordinance is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end(49). He noted that even the R.A.V. majority had conceded that St. Paul's interest, "to ensure the basic human rights of members of groups that have historically been subjected to discrimination," was compelling(50).

Justice White also disagreed with the majority's characterization of the strict scrutiny test. According to the majority, the dispositive question was whether the content discrimination was necessary. The majority held that this discrimination was not essential because an ordinance not limited to the favored topics would have the same beneficial effect.

This new characterization of the strict scrutiny test was puzzling to Justice White, particularly in light of the Court's decision in Burson v. Freeman(51), just one month prior to R.A.V. Burson involved a prohibition on the display of campaign materials within 100 feet of polling places. In Burson, the Court did find that the discrimination inherent in the ordinance (only political speech was regulated) survived strict scrutiny, and rejected the notion that the legislation needed to be drafted in broader, content-neutral terms(52). Justice White found it unreasonable that lawmakers regulating expressions of

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60 L.W. at 4678 (Stevens, J., concurring).

49. 60 L.W. at 4674 (White, J., concurring).

50. Ibid.

51. 504 U.S. _____ (1992).

52. Justice White cited the Burson plurality opinion, which held that "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist," 60 L.W. at 4675. Justice White also noted that the dissenters in Burson did not complain that the plurality erred in this application of strict scrutiny.

violence must prohibit that entire class of speech, or not legislate at all(53).

A speech code which was limited to racist and sexist fighting words would survive strict scrutiny under Justice White's analysis. Both the majority and concurring justices in R.A.V. agreed that ensuring basic human rights to those who have historically been subjected to discrimination was a compelling state interest. The St. Paul ordinance was designed to limit expression which caused anger, alarm or resentment on the basis of race, color, creed, or gender. College and university speech codes also limit hateful or insulting expression addressed to groups which have been victims of discrimination. An additional state interest when dealing with speech codes is the promotion of equal educational opportunity(54).

A speech code could easily be characterized as "narrowly drawn" to achieve these state interests, using the reasoning in Justice White's opinion. His opinion argued that laws could address a specific problem the state was concerned about, rather than regulating for problems that do not exist. In light of the significant increase in racial unrest on college and university campuses(55), those responsible for implementing speech codes could reasonably maintain that racist and sexist hate speech was a more troubling problem than other forms of offensive language on campus. Broader, content-neutral language would not be required(56).

2. A Speech Code Which Discriminated Based on Content Would Meet the Majority Opinion's First Exception To R.A.V.

Justice White's concurring opinion also argued that the majority's first exception to the R.A.V. rule should apply to the St. Paul ordinance. This analysis would provide a future, more liberal, Supreme Court with grounds to hold that R.A.V. does not prohibit speech codes which are content discriminatory.

The R.A.V. decision would allow for content discrimination when the basis for the distinction is the "very reason the entire class of speech at issue is proscribable." Thus, if racist or sexist language was more likely to provoke the average addressee to fight than other types of fighting words, the exception would be met. In the opinion of the concurring justices, this propopsition is true. Justice White noted that fighting words convey a

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53. Ibid.
54. See, e.g., Lawrence, supra note 32, at 464-65.
55. Richard Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collision," 85 NORTHWESTERN LAW REVIEW 343 (No. 2, 1991).
56. 60 L.W. at 4675 (White, J., concurring).

message that is "at its ugliest when directed against groups that have long been the targets of discrimination(57)." Based on this analysis, a speech code which protected groups which have historically been victims of discrimination would be directed at some of the worst types of fighting words. Thus a content discriminatory speech code would fit the exception to R.A.V.(58).

C. Justice Stevens' Concurring Opinion Provides Grounds For Holding That Content Discriminatory Speech Codes Are Constitutional.

Part I of Justice Stevens' concurring opinion was joined by Justices White and Blackmun. This opinion provided further justification for holding that "fighting words" regulations which discriminate on the basis of content are constitutional.

Justice Stevens opinion took issue with the fundamental premise of the majority's decision. To the majority, the ban on content discrimination was nearly absolute. Justice Stevens argued that given the reality of existing case law, it could not be concluded that "content based regulations of speech are never permitted(59)." Justice Stevens maintained that "content-based distinctions are an inevitable and indispensible aspect of a coherent understanding of the First Amendment," and that content "makes a difference(60)."

Justice Stevens cited a wide variety of cases in which a content-based regulation of speech was upheld. For example, radio stations could be restricted from broadcasting specific indecent words(61). The government could limit advertisements for cigarattes but not

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57. Id. at 4676 (White, J., concurring).
58. It is debatable whether racist and sexist fighting words are truly those most likely to provoke the average addressee to fight. See text accompanying notes 32-3, supra. However, justices are not required to rely on evidence that would be acceptable to social scientists when making a factual conclusion. If the concurring justices believe that racist and sexist language constitutes some of the worst forms of fighting words, that would be a sufficient basis for them to conclude that a speech code fits the first exception to the majority opinion.
59. 60 L.W. at 4679 (Stevens, J., concurring).
60. Id.
61. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). (Upholding the constitutionality of an FCC warning to WBAI-FM because the station played George Carlin's "Filthy Words" at 2 p.m.)

cigars(62). And a city could permit commercial advertising, but prohibit political advertising, on city buses(63).

According to Justice Stevens, cases such as these support the proposition that selective regulations are neither "almost" totally prohibited, nor presumptively invalid, as the majority claimed(64). According to his concurring opinion, the relevant question is "whether the legislature's selection is based on a legitimate, neutral, and reasonable distinction(65)."

The concurring opinion noted that such a distinction should support the constitutionality of the St. Paul ordinance. The concurring justices believed that the St. Paul City Council could reasonably conclude that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats(66).

The same reasoning would support the constitutionality of a speech code which prohibited only those fighting words that are racist or sexist. In the opinion of the concurring justices, fighting words may be uniquely harmful(67). A speech code which made content-based distinctions would be particularly justifiable if the code was adopted in response to racist and sexist incidents on campus(68).

CONCLUSION

The majority opinion in R.A.V. v. City of St. Paul held that when a regulation on speech fits a categorical exception to the First Amendment, that regulation must be content-neutral. Based on this reasoning, college and

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62. 15 U.S.C. 1331-1340. See also Packer Corp. v. Utah, 285 U.S. 105 (1932).
63. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).
64. 60 L.W. at 4680 (Stevens, J., concurring).
65. Id.
66. Id.
67. See text accompanying notes 57-8, supra. It is worth noting that the concurring opinion seemed to advocate a "rational basis" analysis of the legislature's justification for the distinction, rather than an analysis based on strict scrutiny. The opinion noted that the legislature "may determine" that the risk of fraud is greater in the legal trade than in the medical trade, Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978), or that the risk of breach of peace created by race-based threats is greater than that created by other threats.
68. According to one commentator, over the past few years, nearly 200 college and university campuses have experienced racial unrest serious or graphic enough to be reported in the press. Delgado, supra note 55 at 343.

university speech codes which only regulate fighting words directed at historical victims of discrimination would probably be held unconstitutional as well.

However, four of the Court's more liberal justices supported concurring opinions. These opinions agreed that the St. Paul ordinance was unconstitutionally overbroad, but they left the door open for a ruling that a speech code, if limited to racist and sexist "fighting words," would be constitutional. In addition, the justices believed that the majority's own exceptions to R.A.V. should have legitimized the St. Paul ordinance. This same analysis could easily form the basis of a ruling that a university speech code was constitutional. Finally, these justices did not agree that Supreme Court precedents created a nearly absolute ban on content-based prohibitions. To the contrary, the concurring opinions suggested that a university could reasonably conclude that racist and sexist fighting words were a uniquely onerous problem in need of remediation.

After R.A.V. v. City of St. Paul, many college and university speech codes would be found unconstitutional by the Court's current majority. However, if a member of the majority left the Court and was replaced by a jurist whose philosophy was more consistent with the R.A.V. concurring justices, any speech code case reaching the high court would have a greater chance of survival. Members of the Freedom of Speech community who believe that all codes are an unconstitutional abridgment of speech should carefully scrutinize any prospective Clinton nominee to the high court.